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HENRY A. SOLOMON
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November 10, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Reference: **PP Docket No. 93-253**


Dear Mr. Cimko:

We submit an original and four copies of Comments on behalf of The LuxCel Group, Inc., in the above-referenced proceeding.

If there are any questions in regard to this matter, kindly communicate directly with this office.

Respectfully submitted,

THE LUXCEL GROUP, INC.

By 

Henry A. Solomon
Its Attorney

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Before The

Federal Communications Commission

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter Of)

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding)

PP Docket No. 93-253

TO: The Commission

COMMENTS OF THE LUXCEL GROUP, INC.

The LuxCel Group, Inc. ("LuxCel"), by its attorneys, respectfully submits its Comments in response to the Commission's *Notice of Proposed Rule Making*, FCC 93-455, released October 12, 1993, (NPRM), in the above-referenced proceeding. In support hereof, the following is stated:

I. INTRODUCTION

LuxCel is a public company¹ engaged in the sale and resale of wireless communications services and the sale of telecommunications equipment, principally in the northeastern United States. LuxCel's activities include acting as an agent for cellular telephone carriers in the metropolitan Boston area and parts of New England. Directly and through subsidiaries and affiliates LuxCel is the licensee of public and private land mobile paging systems, and holds experimental PCS licenses in Philadelphia, New York and Boston.² LuxCel is in the process of

¹ NASDAQ symbol for common stock LXCL.

² The licensee of such station, PCS Network, Inc., was a proponent of a Pioneer's Preference based on an innovative signalling technique which would materially enhance voice and data transmissions to users of personal communications devices. See Request for Pioneer's Preference, filed May 4, 1992 in ET Docket No. 92-100.

expanding its wireless communications operations to include operating as a paging carrier in Russia and other republics formerly comprising the Soviet Union, in Poland, and in other areas of Eastern Europe.

LuxCel is clearly an "interested party" to this rule making within the meaning of 47 C.F.R. § 1.415(c). In its capacity as a Part 22 licensee in the New York Metropolitan Area and Florida, it provides or will provide, commercial mobile service, and will thus potentially be affected by the competitive bidding auction process. Additionally, LuxCel is exploring PCS licensing opportunities: As a small business, and thus potentially, a "designated entity," it wants to ensure that auction rules ultimately adopted are fair and that they fully effectuate the Budget Act's command that the Commission afford small business applicants viable opportunities to become licensees. LuxCel's focus in these comments is the classification and treatment of designated entities in the bidding for PCS spectrum.

II. THE NOTICE OF PROPOSED RULEMAKING

In the Omnibus Budget Reconciliation Act of 1993,³ Congress directed the FCC to employ competitive bidding procedures for awarding licenses to use the electromagnetic spectrum. In Section 309(j) of the Budget Act, Congress specifically mandated that the selection process promote "economic opportunity," ensure new and innovative technologies, and avoid excessive concentration of licenses in the hands of a few, "by disseminating licenses among a wide variety of applicants,

³ Pub. L. No. 103-66, 107 Stat. 312, which amended the Communications Act of 1934, and will be codified at 47 U.S.C. §§ 151-713 (hereinafter Budget Act). Section 6002 of the Budget Act addresses auctions.

including small businesses, . . ."⁴ In the *NPRM* issued to implement the Budget Act, the Commission sought comment on a variety of issues dealing with small and minority and female owned businesses. Among those issues is whether special tax treatment and payment procedures should apply to these designated groups and whether the current definition of a small business is adequate to ensure such businesses will be able to compete effectively for the spectrum.

III. CLASSIFICATION OF BUSINESSES AS "SMALL"

In establishing criteria for determining whether a business is small, and thus entitled to preferential treatment under the competitive bidding scheme, the Commission should adopt the Small Business Advisory Committee's (SBAC) recommendations⁵ regarding classification standards for small businesses. Currently, in order to obtain financial assistance from a Small Business Investment Company (SBIC), an applicant's net worth may not exceed \$6.0 million and its average net income after Federal taxes for the two proceeding years may not exceed \$2.0 million.⁶

No small business should be penalized for its success in raising capital for the purpose of gaining PCS licensure. As the SBAC suggests, this threshold for determining whether a business is small is not appropriate for the capital intensive telecommunications industry.⁷ Furthermore, it is clear that in order to be a PCS "player" many applicants will require threshold infusions of significant equity capital,

⁴ 107 Stat. 312, 388, to be codified at 47 U.S.C. § 309(j).

⁵ See *Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding Gen. Docket 90-314*, September 15, 1993 (hereinafter *SBAC Report*).

⁶ *Id.* at 20.

⁷ *Id.* at 21-22.

thereby increasing net worth above the SBA's net worth ceiling figure. Therefore, LuxCel supports adoption of the SBAC's recommendation that a business may have net worth of up to \$20 million and still be regarded as "small" for competitive bidding purposes.

Tying the definition of a small business to the number of persons the business employs --e.g., as set forth in 13 C.F.R. § 121.601-- is not recommended. Due to the capital intensive (as opposed to labor intensive) nature of the telecommunications industry, even a business with just a few employees could have assets far in excess of \$20 million, as noted by the SBAC Report.⁸

IV. SPECIAL TREATMENT SHOULD BE ACCORDED QUALIFIED SMALL BUSINESSES

LuxCel urges that the incentives and preferential treatment measures advocated by the SBAC be adopted. The SBAC encouraged the use of installment payments and royalties, distress sales, a reinvestment of a portion of the spectrum auction revenues into small firms seeking to enter the telecommunications field, and the use of tax certificates.⁹ In the *NPRM* the Commission is considering a variety of measures, including tax certificates, set-asides, bidding preferences, and preferential payment terms such as delayed or extended installment payments to qualifying bidders.¹⁰ Congress' mandate to ensure that small businesses, rural telcos, and businesses owned by women and

⁸ *Id.* at 20-22.

⁹ *Id.* at 15-20.

¹⁰ *NPRM* at ¶ 73.

minorities are "given the opportunity to participate"¹¹ in providing spectrum-based services, thereby prompting economic opportunity for these entities, will be served by special treatment to the entities.

In addition to the financial self-certification proposed by the SBAC, and discussed below, LuxCel regards tax incentives as a constructive way of encouraging small business participation in the deployment of PCS. The *NPRM* tentatively concluded that different approaches may be appropriate to address specific concerns applicable to each enumerated entity.¹² LuxCel believes the same incentives should be made available to *all* parties (small businesses, rural telcos, females and minorities) that the Commission determines are "designated entities." If the statutory objective is to promote economic opportunity for these entities, the incentives provided to achieve the goal should not be determined based on the kind of entity; a small business may be just as deserving of a tax certificate as a minority- or female-owned business would be. Therefore, LuxCel believes the Commission should not discriminate in providing incentives.

V. INCENTIVES SHOULD ENCOURAGE SMALL BUSINESSES TO BID FOR NON-SET-ASIDE BLOCKS OF SPECTRUM

The *NPRM* asks whether the incentives and preferential treatment proposed for designated entities should be available to them outside of the set-aside blocks.¹³ Consistent with the statutory objective,

¹¹ See Conf. Rep. at 482-484; see also H.R. Rep. No. 103-111 at 255, Pub. L. No. 103-66, 107 Stat. 312, Omnibus Budget Reconciliation Act of 1993, amending the Communications Act of 1934, to be codified at 47 USC §§ 151-713, as amended.

¹² Specifically, the Commission suggested that it could propose deferred payment terms for small businesses and tax certificates for businesses owned by women and minorities. See *NPRM* at ¶ 75.

¹³ *NPRM* at ¶ 121.

the auction rules should encourage designated entities to compete as bidders for access to *all* spectrum blocks, not just for Blocks C and D. But, to do so, they must have a realistic opportunity to compete against more established telecommunications entities, and new entities enjoying large infusions of investment capital. LuxCel believes that the tax certificate, deferred payment, and decreased upfront payments should be available to any qualified small business bidding on any block of spectrum, even if that spectrum is not set-aside specifically for designated entities.

Furthermore, in order to help encourage small businesses to bid against other parties for the non-set-aside blocks, LuxCel proposes the Commission allow businesses that have 25 million in net worth (as opposed to the current \$6 million, or the proposed \$20 million) to be considered "small businesses," and thus to gain designated entity status. Granted, in auctions for the non-set-aside blocks, a company's net worth will be irrelevant because the spectrum will go to the highest qualified bidder. But, a business with less than 25 million net worth (or some other figure higher than 20 million arrived at by the Commission) that wins an auction will benefit greatly from a tax certificate or from an installment payment plan. LuxCel recommends the Commission consider this suggestion.

VI. FINANCIAL ISSUES INVOLVED IN THE BIDDING PROCESS

The SBAC recommended that the Commission encourage economic opportunity for small businesses by adopting financial qualifications guidelines that treat SBA-chartered Small Business Investment Companies (SBICs) and Specialized Small Business

Investment Companies (SSBICs), as bona fide financial institutions for reasonable assurance purposes.¹⁴ An SSBIC may act as a de facto financial institution because it is able to leverage large sums of money from the SBA for each dollar of equity capital the small business has from private sources.¹⁵

In addition, allowing qualified small businesses to self-certify their financial qualifications will greatly increase the universe of smaller entities that can participate in delivering PCS. This certification procedure could be accomplished through the SSBIC system or based on a firm's funds or an investment bank commitment letter, all of which are recommended by SBAC.¹⁶

The SBAC also recommended, and LuxCel proposes, allowing small businesses to pay for their investment in the spectrum, over time, through installment payments.¹⁷ This payment method would give a small business "breathing room" to get its PCS delivery underway while not depleting all of its capital on the spectrum bid. A small business that must pay the deposit immediately may be compelled to postpone prompt construction. This dilemma would not serve the small business or the public interest.

LuxCel agrees with the Commission's determination that "it is important to limit bidding to serious qualified bidders," in order to prevent the Commission from being faced with a situation where it cannot award a license to the auction winner,¹⁸ and in that respect

¹⁴ *SBAC Report* at 13.

¹⁵ *Id.*

¹⁶ *SBAC Report* at 12-19.

¹⁷ *SBAC Report* at 15.

¹⁸ *NPRM* at ¶ 102.

agrees that an "upfront payment" be made by each applicant prior to the auction. But LuxCel does not think that the "upfront payment" should be so costly as to be prohibitive to the ability of small businesses to compete. In this respect, LuxCel proposes basing the upfront payment on a flat fee of approximately \$250,000 for a 20 MHz block and \$125,000 for a 10 MHz block.¹⁹

If the Commission disagrees with the flat fee and instead determines that the "pop" figure, discussed in the *NPRM*, is the measure to be applied for upfront payments, LuxCel suggests that the figure be less than 2 cents per pop, at least for small businesses bidding for spectrum. LuxCel suggests the pop figure, if adopted, should be one cent or less per-megahertz-per-pop.

If the Commission is concerned that such a low figure will not be sufficient to discourage bidders who are not serious, the Commission could attach a penalty provision to any upfront payment. For example, each party making an upfront payment would be told that, should it be chosen as the successful bidder and then not build, it would forfeit its upfront payment.

Finally, the *NPRM* questions whether the Commission should take necessary steps to open interest-bearing accounts for the upfront payments.²⁰ LuxCel believes this is a good idea and encourages the Commission to adopt a rule to this effect because such a rule would promote fairness. Not only small businesses, but any legitimate bidder,

¹⁹ If the pop-per-megahertz figure is less than the flat fee suggested by LuxCel, the lower figure should, of course, govern.

²⁰ *NPRM* at ¶ 100.

should be entitled to a modest return on funds held in the equivalent of a government escrow.

VII. THE COMMISSION SHOULD RECOGNIZE INNOVATORS

The *NPRM* sought comment on the SBAC's proposal that alternative methods of bidding, as well as calculating and paying for bids, should be authorized for bidders with superior service proposals.²¹ The alternative bidding calculation would recognize technical innovators and reward them by allowing them to discount or amortize their bid based on a qualitative assessment of the applicant's business development proposal.²² As the holder of experimental PCS licenses and a party who has been involved in the development of PCS technology, LuxCel urges the Commission to recognize the efforts of those designated entities who took the initiative to explore PCS development. In this respect, LuxCel suggests such alternative measures be put in place for designated entities, consistent with the SBAC's recommendation.²³

²¹ See *NPRM* at n.61 and accompanying text.

²² *Id.*

²³ *SBAC Report* at 13-16.

CONCLUSION

Providing economic opportunity to small businesses to compete in the spectrum auctions was a major objective of Congress in passing the Budget Act. Implementing the suggestions contained herein will provide just the incentives needed to increase participation in auctions by small businesses.

Respectfully submitted,

THE LUXCEL GROUP, INC.

A handwritten signature in dark ink, appearing to read "Henry A. Solomon", is written over a horizontal line.

Henry A. Solomon
Its Attorney

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